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No. 10-535

In the Supreme Court of the United States

RH CAPITAL ASSOCIATES LLC AND
PACIFIC INVESTMENT MANAGEMENT COMPANY LLC,
PETITIONERS

v.

MAYER BROWN LLP AND JOSEPH P. COLLINS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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On June 13, 2011, this Court issued its decision in *Janus Capital Group, Inc. v. First Derivative Traders*, No. 09-525, holding that, in order to "make" a statement for purposes of liability under Section 10(b) and Rule 10b-5, a party must have "ultimate authority over the statement, including its content and whether and how to communicate it." Slip op. at 6. The Court's holding confirms beyond dispute the petition in this case should be denied. Petitioners seek to hold Respondents liable under Rule 10b-5(b) for their alleged role in drafting portions of a corporate issuer's public statements on the basis that to "make" a statement should mean to "create"

it. See, *e.g.*, Pet. i (each Question Presented), 2-6, 12, 13-14. In *Janus Capital*, the Court rejected the SEC's "creator" test as inconsistent with the language of Rule 10b-5(b). Slip op. at 8-9 & n.8. It further reasoned that "[o]ne who prepares or publishes a statement on behalf of another is *not* its maker." *Id.* at 6 (emphasis added). In this case, Respondents (an outside law firm and one of its former partners) never had ultimate authority over statements in public filings made and filed by their client—a corporate issuer. Br. in Opp. 4-5. The Court drew a "clean line"—"the maker is the person or entity with ultimate authority over a statement and others are not," slip op. at 7 n.6—and there can be no doubt on which side Respondents fall.

More broadly, the reasoning of the court below is consistent with the Court's holding in *Janus Capital*. The court of appeals focused on the need for a statement to be attributed to a secondary actor in order for liability to attach based on a misleading statement. Pet. App. 26a & n.6. Similarly, in *Janus Capital*, the Court noted the utility of attribution in determining "ultimate authority," concluding that it is strongly suggestive "that a statement was made by—and only by—the party to whom it is attributed." Slip op. at 6. The lack of attribution of any statements to Respondents in this case confirms that they did not exercise ultimate authority. Pet. App. 27a.

Finally, the Court's decision in *Janus Capital* substantiates the reasoning of the court of appeals that, under *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), Petitioners cannot state a claim under Rule 10b-5(a) and (c). In *Stoneridge*, as in this case, "the public could not have relied on the entities' undisclosed deceptive acts." Slip op. at 7-8 (citing *Stoneridge*, 552 U.S. at 166-67).

For the above reasons and those stated in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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